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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL MAPLES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin

No. 05-1-01577-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether a *Frye* hearing was required for experts to testify regarding their observations of hair characteristics seen through a microscope?
2. Whether the court abused its discretion when it declined to instruct the jury on lesser-included offenses of manslaughter where there was no evidence of recklessness or negligence?
3. Whether the court erred in including a 1977 robbery conviction, a class B felony, in the defendant's offender score where the conviction should have "washed out"?

B. STATEMENT OF THE CASE.

1. Procedure

On January 11, 2005, the State filed an Information charging Daniel Maples with one count of first-degree murder. CP 1-4. The case was assigned to Hon. Thomas Larkin and substantive testimony began on February 5, 2008. RP 480 ff¹. On March 19, 2008, after the jury had deliberated for several days, the court found them deadlocked and dismissed them. RP 2686.

¹ The report of proceedings is numbered sequentially from the pretrial motions of the first trial through the post-sentencing motions of the second trial.

The court granted the defendant's motion to dismiss the first-degree murder charge. CP 215. The State filed an amended Information charging second-degree murder. CP 214. The second trial began May 12, 2008, again before Judge Larkin. RP 2714 ff. After hearing the evidence, instruction, and argument, the jury found the defendant guilty of second-degree murder. CP 326.

On July 25, 2008, the court sentenced the defendant. CP 342-354. The court found that he had an offender score of 8, including a 1977 robbery conviction. CP 345. The court sentenced the defendant to 342 months in prison, the high end of the standard range. CP 348. On the same date, the defendant filed a timely notice of appeal. CP 355.

2. Facts

In 1988, Christine Blais was a young single mother. RP 2804, 3917. She had a job at AK-WA, a shipyard in Tacoma that repaired and retrofitted ships. RP 3035. She usually worked swing or graveyard shifts. RP 4105. When she worked, her brother, Sam, and sister-in-law, Susan, took care of Christine's daughter. RP 2804.

At AK-WA, Blais often worked the same shift as Daniel Maples (hereinafter referred to as defendant) and Kristian Wales. The defendant had difficulty driving. RP 3901. He depended on his wife or co-workers to give him a ride home. RP 3862. The defendant lived at 4841 South J St.

in the south end of Tacoma. RP 3856. Kristian Wales lived at 2609 South 54th St., not far away. RP 3326.

On October 7-8, 1988, Blais worked a graveyard shift, 4:00 p.m. - 2:30 a.m. RP 3040, 4105. It was the same shift as the defendant. RP 4106. At the end of her shift, she wanted to take some empty wire spools home to use as child's furniture or an end table. Most of the workers had left the parking lot, but the defendant and Kristian Wales were still present. RP 3760, 4309. They offered to help Blais load the spools into her car. RP 3062. The defendant asked for a ride home. RP 3322. Kristian Wales saw Blais drive off with the defendant. *Id.*

Christine Blais did not return home that morning. She did not show up for work the next day. Her daughter was concerned and called Sam and Susan to report that there was no sign of her mother at home. RP 2808. When Blais failed to appear for work, Gwendolyn Green, a friend and co-worker, became concerned. RP 3757.

Sam Blais looked in Christine's apartment for signs of her having been there. Her car was gone. RP 2809. He did not see the work clothes she had worn, nor her steel-toe work boots. RP 2814. He called the hospitals to see if she was there. RP 2820. He called the police to report her missing. RP 2815.

Sam Blais next went to AK-WA to ask Christine's co-workers about her disappearance. RP 2821. He was directed to the defendant as the last person seen with Christine. RP 2824. Sam went to the defendant's

home to speak with him. RP 2824. The defendant told him that Christine had given him a ride. He stated that she had dropped him off by the Puyallup River bridge at Portland Ave. RP 2827. The defendant went on to say that she had turned north and drove toward Fife. *Id.* Sam Blais became suspicious of this account and noticed a large bruise on the defendant's neck. RP 2825. He called police to report that the defendant was the last person seen with Christine Blais. RP 2834.

Gwen Green worked at AK-WA and delivered newspapers. RP 3741, 3757. Christine Blais was a friend of hers at work and also one of her newspaper customers. RP 3745, 3757. On October 9, she noticed that the previous day's newspaper was still at Blais' apartment. RP 3758. Green remembered that she had last seen Blais loading the wire spools into her car with the defendant. RP 3760.

The next day at work, Green asked the defendant about Blais. RP 3762. The defendant told her that Blais had given him a ride and dropped him off at the La Quinta hotel parking lot. As she asked him more questions, he changed the drop-off location to a freeway entrance and again to a Puyallup Ave. intersection. RP 3762.

Robert Sarnoski also worked with the defendant and Blais at AK-WA. RP 4297. The day of Blais' disappearance, she had expressed concern to him regarding giving the defendant or Wales a ride home. RP 4309. Sarnoski had seen Blais with the defendant and Wales the day of her disappearance, after their shift was over. *Id.* A few days later, Sarnoski

asked the defendant about Blais. The defendant told him that she had dropped him off at a bar in Tacoma near the intersection of Puyallup and Pacific Avenues. RP 4310-4311.

Bonnie Davey was another AK-WA co-worker. RP 3035. After Blais disappeared, she asked the defendant about Blais. He told her that after he had helped Blais load the spools in her car, she gave him a ride to the area of Puyallup Ave. He went on to say that she then turned and drove off in the opposite direction. RP 3062.

Sharon Shovlain often worked the same assignment at AK-WA with the defendant. RP 3981. The defendant wore a watch, while not many others did. RP 3882. She often asked him the time, so that they would know when to take their break or lunch. RP 3983. After Blais disappeared, she noticed that the defendant's watch was gone. RP 3984. When she asked about his watch, the defendant replied that he had lost it and that she should not ask him about the time anymore. RP 3985. She talked to him about Blais disappearance. The defendant told her that she had dropped him off near Puyallup Ave. after they left work. *Id.* After Blais remains were found, Shovlain read about a watch found at the scene. She called police to report her conversation with the defendant. RP 3985.

Norman Fahlbeck was a service mechanic for Tacoma City Water in 1988. RP 2999. On October 27, 1988, while parking his city van during a coffee break, he discovered Christine Blais' car parked behind a restaurant on South Sprague Ave. in the south end of Tacoma. RP 3004,

3011. Fahlbeck later realized that the day before, he had seen the same car parked near the Water Dept. pumphouse on McMurray Rd. in northeast Tacoma. RP 3011, 3016.

Bloodhounds were brought in to search the area where Blais' car was found. RP 4340. Police and volunteers searched the area between South 56th to South 72nd in Tacoma, centering around South 64th. RP 4337. Three separate bloodhounds followed a scent track directly from Blais' car to a nearby trash dumpster. RP 4348, 4351. The person who had last driven Blais' car had spent time at the restaurant trash dumpster. RP 4352, 4376.

James Farrell lived at 302 McMurray Rd. in Tacoma in 1988. RP 2973. On January, 7, 1989, one of his dogs ran across the road, toward the Water Dept. pumphouse. While retrieving the dog, Farrell discovered a human skull. RP 2983, 2984. The skull was later identified as that of Christine Blais. RP 3598. Farrell called the police. RP 2983.

The McMurray Rd. area was a heavily wooded ravine near the Tacoma tideflats where the AK-WA shipyard was. RP 2977, 3111. Searchers were called out to comb the area for Christine Blais' remains. RP 4385. During several days effort, searchers and police discovered Blais' skeletal remains scattered in the ravine behind the Water Dept. pumphouse. RP 3192. They found 30 bones, including her legs, arms, and one of her hands. RP 3169, 3178, 3180, 4400. Near the skull, searchers also found a large clump of human hair, later identified as belonging to

Blais. RP 3117, 4391. Dr. Howard, the medical examiner, found an area of soil near the pumphouse that appeared to be where the body had decomposed. RP 3167.

At the site, with the remains, near the skull and hair, searchers also discovered a man's wristwatch. RP 3112, 3502. It was later identified as the defendant's watch. RP 3621, 3868.

Despite the use of bloodhounds and cadaver dogs, they were unable to find any more of her remains. None of Blais clothing, including her steel-toe work boots, was ever found at the site or anywhere else. RP 4402. Dr. Howard testified that not finding the clothing was significant. RP 3203. Clothing is usually found at the site of human remains. *Id.* In cases of homicidal violence, it is common for the victim to be found without clothing. *Id.*

Kristian Wales worked at AK-WA with the defendant and Blais. RP 3294, 3295. At the end of their shift on October 8, 1988, he saw the defendant and Blais together in the parking lot. RP 3321. Wales asked the defendant if he had a ride home. The defendant said that he was getting a ride from Blais. RP 3322. It was after 2:30 a.m. RP 3318.

After Wales got home, the defendant called him at about 4:00 a.m. The defendant asked Wales to come pick him up in the tideflats. RP 3327. The defendant said that Blais' car had had trouble. *Id.*

Wales met the defendant where the defendant requested. RP 3329. The defendant told him that Blais had gotten a ride from someone else. RP

3330. The defendant then directed Wales to drive along a route that ended going uphill on a dark, winding road. RP 3332. They drove up to a small building. Wales saw Blais' car parked off the shoulder of the road. RP 3336. He parked behind her car. *Id.* The defendant gave Wales the keys. *Id.* The car started up without any problem. RP 3337. At the defendant's direction, Wales drove the car to the defendant's home and parked it behind the house. RP 3338, 3341.

The defendant and Linda Maples lived at 302 McMurray Rd. 1986-1987. RP 3850-3851. The area was very wooded. RP 3852. The two of them often walked in the woods near their house. RP 3853.

On October 8, 1988, the defendant did not get home until approximately 6 a.m. RP 3865. He had never been that late from work. RP 3866. When he returned home, the defendant's pants were soaked with blood from his hips to his knees RP 3871. The knuckles on his right hand were scraped and bloody. RP 3869. His neck was bruised. RP 3870. His watch was gone. RP 3872. He had had large folding knife with a 4-6 inch blade with him. RP 3896, 3909. It, too, was gone. RP 3873.

In their initial investigation of Blais' disappearance, police interviewed the defendant on October 14, 1988. RP 4148. He told them that Blais had given him a ride to Puyallup Ave., where he got out. She then drove north toward Federal Way. RP 4155. He said that Blais' car had no problems. *Id.* He claimed that he then walked the nearly 4 miles home. RP 5156.

After Christine Blais skeletal remains were found, Tacoma Police detectives went to the defendant's home to arrest him on January 13, 1989. RP 4174. The defendant then pointed to a bedroom and said if he and the detectives could go in there, he would tell them exactly what happened, if they promised not to arrest him. RP 4175. Police then arrested him for the murder of Christine Blais. RP 4174. The prosecuting attorney did not file charges at the time. RP 4178.

C. ARGUMENT.

1. EXPERT TESTIMONY REGARDING
MICROSCOPIC HAIR EXAMINATION WAS
ADMISSIBLE.

There is no question that the use of microscopes, or microscopy, is widely accepted in the scientific community. Scientists have been using microscopes since the 17th century. In 1665, Robert Hooke used an early compound microscope to examine cork and fibers. 6 **Encyclopedia Britannica**, Robert Hooke, 44 (15th ed., 2005). In 1674, Anton van Leeuwenhoek used a simple microscope to observe bacteria and protozoa. 7 **Encyclopedia Britannica**, Anton van Leeuwenhoek, 240 (15th ed., 2005).

- a. Testimony regarding the forensic use of a microscope to examine evidence does not require a *Frye* hearing.

A *Frye* hearing is required only if the evidence in question is derived from a novel scientific theory or principle. See *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996); *State v. Phillips*, 123 Wn. App. 761, 766, 98 P.3d 836 (2004). Microscopic examination of evidence is common in criminal cases. Even as different kinds of microscopes have been developed, *Frye*²hearings have not been required. See *Commonwealth v. Whitacre*, 878 A. 2d 96, 101 (Pa. Super. 2005) (use of a comparison microscope did not require *Frye* hearing regarding the comparison of shell casings. Held that use of microscope was not new technology or methodology.); *People v. Serrano*, 219 A. D. 2d 508, 509, 631 N.Y. S. 2d 340 (1995) (trial court properly denied *Frye* hearing for use of scanning electron microscope to look for lead particles regarding gunshot residue).

- b. General microscopic examination of hair does not require a *Frye* hearing.

The microscopic examination of hair is widely accepted in the scientific community. See, e.g., *Murray v. State*, 3 So. 3d 1108, 1117 (Fla. 2009) (microscopic hair comparison is not new or novel); accord, *State v. Brochu*, 183 Vt. 269, 288, 949 A. 2d (2008); *People v. Sutherland*, 223

Ill. 187, 253, 860 N.E. 178 (2006); *State v. Reid*, 254 Conn. 540, 548-549, 757 A. 2d 482 (2000); *State v. Southern*, 294 Mont. 225, 242, 980 P.2d 3 (1999). *See generally*, Gregory Sarnow, *Admissibility and weight, in criminal cases, of expert or scientific evidence respecting characteristics and identification of human hair*, 23 ALR 4th 1199, § 7 (1983).

The legal issue regarding microscopic hair examination is not the science itself, but the conclusions experts can draw from their observations. There is no question that, where the proper foundation is laid, an expert may compare samples and testify regarding their observations of the hair.

An issue of reliability or acceptance in the scientific community arises where the expert opines regarding the identity of the person donating the hairs. *See* Clive Smith and Patrick Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 Colum. Hum. Rts. L. Rev. 227 (1996). In this article, the authors acknowledge the scientific acceptance of microscopic analysis of human hair. However, citing verification tests and surveys, they go on to criticize the use of statistics and probabilities of the hair comparison to identify a suspect. *Id.*, at 283.

²*Frye v. United States*, 293 F. 1013 (D.C. Circ. 1923).

- c. No error occurred where the court granted the limitations requested by the defense and the witnesses did not violate the court's order.

In the present case, the defense moved to exclude or limit the testimony of expert George Johnston, citing *Frye* and ER 702. RP 3968. The court agreed that the witnesses could not testify that they could match hair, but could testify regarding observations of the characteristics of the hair samples in question. RP 3969.

After this, defense counsel raised a separate motion in limine regarding “stretched hair” testimony. This defense objection was limited to the potential link to sexual assault cases:

Ms. High: One other thing, Ms. Wagner and I talked just a moment ago about testimony about a stretched hair, and she indicated that it was Charles Vaughn that testified about that stretched hair and trying to make that link to sexual assaults. And I don't believe that Mr. Johnston testified to that, but I would make a motion in limine that neither of those witnesses testify about stretched hair and what they have seen in rape cases. As you know, Dr. Howard was not willing or able to provide any testimony regarding some kind of sexual assault, and I think that that is very prejudicial.

RP 3970. The court again agreed:

The Court: As to what he's allowed to do. Certainly he can't come to any conclusion, because I would agree, it is not scientifically accepted at that time. I always thought they could tell by hair. So in the last trial, I learned that we can't.

RP 3971.

George Johnston testified as an expert regarding trace evidence, specifically hair. RP 4018. He examined hair recovered from the scene. RP 4021. This included a large amount of hair, referred to as the “hair mass” (RP 4028) and hairs taken from the victim’s car. RP 4022. He explained how hairs are examined with a microscope (RP 4031) and basic hair biology. RP 4036. He testified that through microscopic examination he could tell if hairs had similar characteristics, but could not say if hair came from a particular person. RP 4038.

Some of the hairs were intertwined and adhering to the defendant’s watch, which was found at the scene. The hairs were wrapped around the watch and stuck in the band. RP 4045. Johnston testified that seven of those hairs were microscopically similar to the hair mass and could have come from the same person. RP 4046.

Johnston went on to testify that some of the hairs from the scene were cut or broken. RP 4044. He also testified that one of the hairs connected to the defendant’s watch had a root. He stated that it was different from those in the hair mass because its root was intact and not putrid. He testified that the hair with the root looked “closer to being forcibly removed or something.” RP 4046. The defendant did not object to any of this testimony.

Johnston also examined two pieces of rope found at the scene. RP 4050. Both pieces appeared to be from the same rope source. RP 4050. One piece was 28 inches long. The other was 48 inches long. RP 4050-4051. The shorter piece had a knot in one end. RP 4051. A clump of hair was found on the longer piece. The microscopic characteristics of that clump were similar to the hair of the “hair mass.” RP 4051.

Charles Vaughn also testified regarding trace evidence and hair. RP 4429. He testified that the “hair mass” was identified as being from the victim’s remains. RP 4431. He also examined the hairs connected to the watch. RP 4438. He testified that 2 or 3 of those were broken and appeared to be stretched. RP 4439. These stretched hairs appeared similar to the victim’s “hair mass.” RP 4439.

He described how stretched or broken hair appears under the microscope. He testified that hair stretched beyond its “spring-back stage” can break. He testified that such hairs appeared “rumpled” under magnification. RP 4440. The hairs in the sample from the watch appeared to have been stretched to breaking. *Id.* Again, the defendant did not object to this testimony.

- d. The defendant's current objection to testimony regarding stretched hairs was not preserved for review where the defendant did not object to the testimony in the trial court.

Unless it is an issue of manifest constitutional error, a defendant who fails to object to the admission of evidence in the trial court cannot raise the issue on appeal. *State v. Powell*, 166 Wn.2d 73, 83-84, 206 P.3d 321 (2009); *State v. Hodges*, 114 Wn. App. 668, 673, 77 P.3d 375 (2003).

The defense did not object to Johnston and Vaughn's testimony regarding stretched hairs. As the defense had requested in its motion in limine, the witnesses did not testify regarding their experience seeing such hairs in sexual assault cases, or make any other link to sexual assault cases. Apparently, the defense was satisfied that the testimony of Johnston and Vaughn complied with its motions in limine. Because the evidence was admitted without objection, the State could argue the evidence in closing. Again, the defendant did not object to the State's argument regarding the "stretched hair" testimony. There were no objections to the "stretched hair" testimony at trial, therefore, it should not be considered on appeal.

2. WHERE THERE WAS NO EVIDENCE THAT DEFENDANT RECKLESSLY OR NEGLIGENTLY CAUSED THE DEATH OF THE VICTIM, NO INSTRUCTION WAS GIVEN ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

A trial court's refusal to give a requested instruction, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

An instruction on a lesser included offense is proper where: (1) each element of the lesser offense is a necessary element of the crime charged (legal prong), and (2) the evidence supports an inference that only the lesser crime was committed (factual prong). *State v. Fernandez-Medina*, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000).

In order to satisfy the factual component of the test there must be *substantial evidence* that *affirmatively* indicates that manslaughter was committed to the exclusion of first or second degree murder. *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000), citing *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980))(emphasis added). "It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented

which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990) (citing *State v. Rodriguez*, 48 Wn. App. 815, 820, 740 P.2d 904, review denied, 109 Wn.2d 1016 (1987)).

The State agrees that the first prong of the test is satisfied and first and second-degree manslaughter is a lesser included offense of second-degree intentional murder. *Berlin*, 133 Wn.2d at 553. The question is whether the record supports the second prong. When determining if the evidence is sufficient to support giving an instruction, a court views the evidence in the light most favorable to the party that requested the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. But the party requesting the instruction must point to evidence that affirmatively supports the instruction, and may not rely on the possibility that the jury would disbelieve the opposing party's evidence. *Fernandez-Medina*, 141 Wn.2d at 456; *State v. Ieremia*, 78 Wn. App. 746, 755, 899 P.2d 16 (1995). An inference that only the lesser offense was committed is justified "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Here, defendant was charged with second-degree intentional murder. The elements of murder in the second degree as charged, include intentionally causing the death of another. RCW 9A.32.050(1)(a). The

elements of first-degree manslaughter are causing the death of another with recklessness. RCW 9A.32.060(1)(a). The elements of second-degree manslaughter are causing the death of another with criminal negligence. RCW 9A.32.070. “Criminal negligence occurs when a reasonable person would realize the presence of a substantial risk of harm.” *State v. Hughes*, 106 Wn.2d 176, 190, 721 P.2d 902 (1986); RCW 9A.08.010(d).

In the present case, there is no evidence of reckless or negligent behavior resulting in the victim’s death. Although the defendant attempts to raise the issue of intoxication (App. Br. at 17) and, thereby a reduced mental state, there was no evidence of intoxication. The only evidence that the defendant had been drinking before the murder came from his statement to Det. O’Malley. The defendant told him that the defendant had “a couple of swallows” of beer. RP 4154. According to the defendant’s statement, Ms. Blais then told him to put it down. The defendant said that he left the beer in the trash and had no more beer. *Id.* Neither Kristian Wales nor Linda Maples, both of whom saw the defendant soon after the murder, testified that the defendant was intoxicated in any way. Although Wales testified that some workers drank or used drugs during breaks (RP 3291), there was no evidence that the defendant did so on the day of the murder; or ever did.

Defendant now argues that evidence of his inconsistent statements and consciousness of guilt supports manslaughter. App. Br at 15-16. This evidence could be consistent with guilty feelings for any criminal

behavior, including manslaughter. Indeed, it is consistent with non-criminal behavior, such as cheating on his wife with a young co-worker. But this evidence does not show that the defendant committed *only* the lesser-included crime to the exclusion of the charged offense as required by *Fernandez-Medina, supra*.

Here, the evidence showed that the defendant had Ms. Blais drive her car to a dark, secluded spot that he was familiar with. There was evidence of a struggle. The defendant's watch became entangled in Ms. Blais' hair, was broken, and left at the scene. Two pieces of rope were found at the scene. One of them had the victim's hair entangled in it. The defendant's knuckles were scraped. His pants were covered with blood. He lost his knife. The victim's clothes were never found. This is all evidence of an abduction and struggle, of intentional acts, even planning. There was no evidence that the abduction and struggle; or the cause of death, were in any way reckless or negligent. There was no evidence, substantial or otherwise, which affirmatively established the defendant's theory on the lesser offenses.

While the defendant may argue conflicting theories in his defense, evidence must still exist to support the theories.

The defendant points out that evidence that the defendant may not have formed the requisite intent supports instruction on a lesser offense. App. Br. at 19, citing *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708

(1997). This is a correct statement of the law. However, as in *Warden*, there still has to be evidence.

In *Warden*, evidence was introduced which supported instructions on the lesser-included offenses. The defendant admitted killing the victim. The defense was diminished capacity. The defense called an expert to testify regarding the effect of post-traumatic stress disorder (PTSD) on the defendant's ability to form the requisite intent. However, the trial court declined to give the defendant's proposed instructions on manslaughter.

Warden is not based upon the defendant's "absence of identification of a disregarded specific risk" (App. Br. at 19). It is based upon the defendant's inability to form a requisite intent due to a mental defense, diminished capacity. Therefore, *Warden* does not support the defendant's argument here.

The defendant was not forced into an "all or nothing" strategy. The defendant compares his case to *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006). However, in *Pittman*, unlike the present case, there was actually evidence from which the jury could find that the defendant committed only the lesser offense. In *Pittman*, there was testimony that the defendant told police that he had been using drugs and had mistaken the victim's car for his mother's and went to the house to apologize. The victim testified that the defendant seemed intoxicated or high.

In the present case, there is no evidence of the defendant's reduced mental state or that he committed a reckless or negligent crime to the

exclusion of the crime charged. There is no evidence that he was intoxicated (*see* argument *supra*). There is no evidence that he thought he was defending himself, as in *State v. Schaffer*, 135 Wn.2d 355, 957 P.2d 214 (1998), but recklessly or negligently over-reacted. There was no evidence that what happened was an accident, as in *State v. Hunter*, _ Wn. App. _, _ P.3d _, 2009 WL 2877905 (2009) and *State v. Hernandez*, 99 Wn.2d 312, 997 P.2d 923 (1999).

There is no evidence from which a rational juror could conclude that the defendant committed only the lesser-included offense. There is no substantial evidence which affirmatively established the defendant's theory of the lesser offenses. The trial court did not err in refusing to instruct on manslaughter.

3. THE DEFENDANT'S 1977 ROBBERY
CONVICTION WAS A CLASS B FELONY
WHICH SHOULD NOT HAVE BEEN INCLUDED
IN THE OFFENDER SCORE.

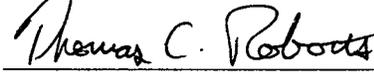
The defendant has a 1977 conviction for robbery. Under *State v. Failey*, 165 Wn.2d 673, 678, 201 P.3d 328 (2009), the robbery would be classified as a B felony. Under the analysis of *Failey*, the conviction "washes out" and would not be included in the offender score. *Id.*, at 679. The defendant should be resentenced with a corrected offender score.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that the Court affirm the defendant's conviction. The State also requests that the case be remanded for sentencing with the correct offender score and sentencing range.

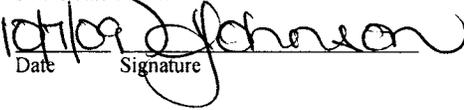
DATED: October 7, 2009.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/10/09 
Date Signature

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